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Supreme Court of the United States

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No. 926

J. S. EDMUNDS, J. L. EDMUNDS AND J. W. EDMUNDS, CO-PARTNERS DOING BUSINESS AS J. S. EDMUNDS AND SONS, PETITIONERS,

versus

RALSTON PURINA COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION

C. T. GRAYDON,

AUGUSTUS T. GRAYDON,
1225 Washington Street,
Columbia, S. C.,

W. GIST FINLEY,
York, S. C.,

Attorneys for the Petitioners.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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versus

RALSTON PURINA COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment to the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on January 25, 1957, petition for rehearing denied on March 15, 1957.

CITATION TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit will be reported in Federal Reporter Second and is printed in Appendix B attached hereto, page No. 17.

Copies of the petition for rehearing have been forwarded to the Supreme Court with the Joint Appendices containing pertinent excerpts from the Record; the order denying the petition is printed in Appendix C attached hereto, page No. 27.

The order of the trial court overruling respondent's motion for a new trial is contained in Volume I of the Joint Appendix at pages 15-18.

JURISDICTION

The Court of Appeals decided this case on January 25, 1957, and denied a petition for rehearing on March 15, 1957. This petition, under the amended rules of the Fourth Circuit, stayed the mandate, and a petition for stay of mandate was granted by Judge Soper on March 22, 1957, so that judgment on the counterclaim has not been entered.

The jurisdiction of this court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Under *Erie v. Tompkins,* are federal courts governed by state decisions in determining the sufficiency of evidence for submission of a case to the jury?

2. Will a federal appellate court be allowed to substitute its judgment for a jury verdict based on sufficient evidence under the applicable rules?

STATEMENT OF THE CASE

This action was commenced by three South Carolinians, who own and operate a large turkey hatchery and feed store at Clover, South Carolina, for damages allegedly caused Edmunds' turkeys as a result of physical changes in the size, color and texture of the feed furnished by respondent, Ralston Purina Company, a Missouri corporation. The changes caused the turkeys to stop eating. Purina denied any defects or deficiencies in the feed and asserted that Edmunds' losses were due to the "possibility of disease". (Vol. I, Jt. App. p. 9.) Purina counterclaimed on its feed account maintained with Edmunds in the agreed amount of $47,831.02.

Jurisdiction of the federal court was based on diversity of citizenship.

The case was tried before District Judge C. C. Wyche at Rock Hill, South Carolina, on March 19-22, 1956. The jury returned a verdict of $40,000.00 for petitioners (plaintiffs below), and the excess of the counterclaim ($7,831.02) was paid with interest and attorney's fee.

During trial Purina moved for a nonsuit and direction of verdict and, after trial, for a new trial and judgment *n. o. v.* All motions were overruled by the trial judge, and an appeal was taken to the United States Court of Appeals for the Fourth Circuit. That court reversed on the grounds that the evidence did not establish a causal relationship between Purina's feed and Edmunds' losses. (See Appendix B.)

Edmunds' attorneys petitioned for a rehearing which was summarily denied by the Circuit Court March 15, 1957. A 30-day stay of mandate pending the filing of this writ was granted.

REASONS FOR GRANTING THE WRIT

This court has stated on many occasions since the passage of the Judges Bill of 1925, 43 Stat. 936, that "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U. S. 220, 227, 69 L. Ed. 925, 926, 45 S. Ct. 496.

As Judge Frankfurter, dissenting in *Rogers v. Missouri P. R. Co.*, 1 L. Ed. (2d) 515, said:

"This is not the supreme court of review for every case decided 'unjustly' by every court in the country."

That this case was decided wrongly and unjustly by the Court of Appeals for the Fourth Circuit is the reason why we file this petition, but that is not sufficient reason for granting the same. That we know full well.

Why then should this court grant certiorari in this case?

The answer is: because the Fourth Circuit Court has failed and refused to follow *Erie R. Co. v. Tompkins,* 58 S. Ct. 817, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487, in deciding a substantive question of law.

Granted the premise that *Erie v. Tompkins* is the rule to be followed in federal courts, the Circuit Court of Appeals (and some other federal courts) seek to prove this rule by constant and repeated exceptions. Even more often, as in this case, the court does not even pay lip service to *Erie v. Tompkins* and continues to base its decisions on some mythical federal common law.

The Circuit Court failed to apply the South Carolina rule in testing the sufficiency of the evidence. That rule has been stated in numerous cases, from which we cite some pertinent excerpts:

Odum v. Weathersbee, 225 S. C. 253, 81 S. E. (2d) 788:

"It is the law of this state that a case should be submitted to the jury not only when the testimony is conflicting, but likewise when the inferences from it are in doubt."

Hiers v. South Carolina Power Co., 198 S. C. 280, 17 S. E. (2d) 698:

"The jury has the special prerogative to decide the facts, if the evidence tends to sustain the reasonable probability of the manner or way relied upon by the plaintiff even if the injury might have occurred in one of a dozen ways. The law does not require proof to a certainty in a civil suit."

Woodle v. Brown, 223 S. C. 204, 74 S. E. (2d) 914:

"* * * under the Scintilla rule which prevails in South Carolina, if there is a scintilla of evidence, which is any material evidence that if true would tend to estab-

lish the issue in the mind of a reasonable juror, the case should be submitted to the jury for determination."

See also *Wright v. Gilbert,* 227 S. C. 334, 88 S. E. (2d) 72.

These are the principles to be applied by federal courts in determining whether or not a case should be submitted to the jury, when South Carolina is the forum of trial. In the case of *Hunter v. Allied Mills,* 184 S. C. 330, 192 S. E. 356, these principles were applied in a case against the manufacturer of dog feed by an owner whose dogs had become sick after eating defendant's feed. Without any testimony save the fact of feeding and without any proof of the feed's content, the Supreme Court of South Carolina held that the case was properly submitted to the jury which had returned a verdict for plaintiff.

Degree of proof required to make out a cause of action is a substantive matter rather than a procedural one as the Fourth Circuit has assumed. This is necessary in order to secure uniformity of results in federal courts in diversity proceedings under *Erie v. Tompkins.* Diversity jurisdiction is of course based on "the enforcement of state-created rights and state policies going to the heart of these rights." *Bernhardt v. Polygraphic Co. of America,* 76 S. Ct. 273, 350 U. S. 198, 100 L. Ed. 199. If the state rules are not followed, different results would obtain in federal courts as compared with state courts. In *Waldron v. Aetna Casualty and Insurance Co.,* 141 F. (2d) 230, the Court of Appeals fo. the Third Circuit said:

"Jurisdiction of the case resting upon diversity of citizenship, the substantive rights of the parties are to be determined according to the local law • • •

"• • • While questions of evidence ordinarily relate to matters of procedure, the sufficiency of the evidence goes to the maintenance of the substantive right and is,

therefore, to be tested by local law in cases where such law controls. See *Stoner v. New York Life Insurance Co.*, 311 U. S. 464, 468, 61 S. Ct. 336, 85 L. Ed. 284; *Lennig v. New York Life Insurance Co.*, 3 Cir., 122 F. (2d) 871, 872."

See also *Francone et al. v. Southern Pac. Co.*, C. C. A., 5, 145 F. (2d) 732; *Moran v. Pittsburgh-Des Moines Steel Co.*, C. C. A. 3, 166 F. (2d) 908, cert. denied 68 S. Ct. 1516, 334 U. S. 846, 92 L. Ed. 1770.

In *General Acc. Fire & Life Assur. Corp. v. Schero*, 160 F. (2d) 775, a Fifth Circuit decision, that court said at page 776:

"In a case over which a federal court has jurisdiction based upon diversity of citizenship between the parties, the law of the State in which the court sits governs the sufficiency of the evidence to support the submission of a claim to the jury."

In *Boland v. Love*, C. C. A., D. C., 222 F. (2d) 27, the Circuit Court for the District of Columbia held that the law of the place of injury (Virginia) governed, but that "the application of that standard must be made according to the law of the District of Columbia, for that is a procedural matter. Consequently, the question whether there is sufficient evidence to take the case to the jury must be determined according to our law".

This same reasoning was followed in *Pierce v. Ford Motor Co.*, a Fourth Circuit case, 190 F. (2d) 910 in which this same appellate court said:

"In a federal court, it is for the jury, not the judge, to say what evidence it will believe and what inferences or conclusions it will draw therefrom, even though it is susceptible of conflicting inferences. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35, 64 S. Ct. 409, 88 L. Ed. 520. As the rule is one involving the exercise of the judicial

function, the state practice is not binding on the federal courts * * *"

But the state practice is binding on the federal courts in testing the sufficiency of the evidence, for that is a substantive question. Oblivious to *Erie v. Tompkins,* the Court of Appeals for the Fourth Circuit was oblivious to to the South Carolina rule.

It is not the function of a federal appellate court to accept a state's substantive law in accord with that court's view and to reject the state's substantive law discordant of the circuit court's views. The federal courts must take the state law as it is—the bitter with the sweet, as it were. The result obtained by petitioners (plaintiffs below) is proper under the South Carolina law, and a federal appellate court has no duty, no authority, and no basis to disturb a verdict in accord with South Carolina's rule.

* * *

Aside from the state rule applicable as a result of *Erie v. Tompkins,* the Court of Appeals in the words of Rule 19 in this case "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision."

Perhaps we overstate in paraphrasing Rule 19, for what the Circuit Court has done in this case has become "the usual and accepted course of judicial proceedings"—that is, the substitution of appellate judgment for a jury verdict supported by competent evidence. It is high time that the Supreme Court halt this type of proceeding which is eating at the roots of our jury system.

To digress for a moment to the merits of the case, what happened here?

Edmunds raised breeder turkeys, produced turkey eggs, operated a turkey hatchery, sold turkey feed and processed mature turkeys. Prior to spring, 1956, J. S. Ed-

munds and Sons was the dealer in the Clover area for Ralston Purina, largest feed firm in the world. Business projection for 1955 had been based on 1954 experience with breeder stock of a particular type.

Edmunds followed Ralston Purina's recommended breeder feeding program and used Purina feed only. Without warning or notice, Ralston Purina changed the size, shape and texture of its turkey breeder pellets around January 1, 1955. Edmunds' turkeys went off feed, a serious matter when turkeys are coming into production, and the resulting loss in production played havoc with Edmunds' entire operation.

Edmunds followed exactly the same procedures in 1955 which he had employed successfully with the same breeder stock in 1954. Ralston Purina's experts suspected an infectious disease, but the testimony of numerous veterinary experts (including respondent's) negatived the possibility of disease as the causative factor.

On this issue of Purina's feed versus infectious disease, the case was submitted to the jury which returned a verdict supported amply by the evidence as to damages.

The Circuit Court reversed, and it is our view that the case should have been affirmed—even without applying the South Carolina rule as to sufficiency of the evidence. Using the Fourth Circuit's own yardstick set out in *Kyle v. Swift & Co.*, 229 F. (2d) 887, the case was properly before the jury. In that case, the Fourth Court said:

"It is well settled that for such purpose the evidence must be viewed in the light most favorable to the plaintiff and every inference favorable to the plaintiff which can reasonably be drawn therefrom must be drawn."

For as this court said in *Tennant v. Peoria & P. U. R. Co., supra,* "the very essence of its [the jury's] function is to select from among conflicting inferences and conclu-

sions that which it considers most reasonable." Conversely in the same case, "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences."

For example, in *Schulz v. Pennsylvania R. Co.*, 350 U. S. 523 100 L. Ed. 668, 76 S. Ct. 608, the district court took the case from the jury because there were conflicting inferences of fact, and the circuit court affirmed. This court reversed, saying in part:

"Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn".

Similar cases were presented in *Rogers v. Missouri P. R. Co.*, 1 L. Ed. (2d) 493, 515; *Webb v. Illinois C. R. Co.*, 1 L. Ed. (2d) 503, 515; *Herdman v. Pennsylvania R. Co.*, 1 L. Ed. (2d) 508, 515, and *Ferguson v. Moore McCormick Lines*, 1 L. Ed. (2d) 511, 515. As stated in the *Rogers case*, a jury question is presented when a conclusion may be drawn fixing liability "whether or not the evidence allowed the jury a choice of other probabilities. Circumstantial evidence is not only sufficient, but may be more satisfying and convincing in meeting these criteria than direct evidence."

But for this court's reluctance to grant *certiorari* in cases involving a review of the facts, we would ask for the writ on this basis. We have reviewed the facts briefly and these authorities to show that the Circuit Court was wrong, and that is certainly a reason which should buttress the court's granting of this petition.

Like the grammarian parsing Shakespeare's sonnets, or the zoologist dissecting gorgeous peacocks, or the chem-

ist analyzing Chanel No. 5, the appellate court seizes upon some narrow aspect of the case and says that *ergo* the jury was wrong. But all the facts—and particularly the demeanor of the witnesses, the atmosphere of the trial and the aura of truth—were before the jury.

Those 12 men—and they alone—were entrusted with the appraisal of these facts. It was the jury's function to interpret the nuances of the testimony. The jury, with its common sense, was there to distinguish between conflicting inferences.

And was that jury wrong? Nay, it was the appellate court which erred in substituting its judgment for the jury verdict. It is human—if not judicial—to want to substitute one's judgment for the finding of a jury.

Far be it from us to assert that the jury system is perfect. It has its defects, but it is the system under which our jurisprudence is operated—unless appellate courts are allowed to emasculate the system until nothing more than a shell remains of its former vigor.

Here, as we see it, is the historic role and function of the Supreme Court of the United States—to see that cases are tried and decided in accordance with the spirit and principles of the Constitution, the document which sets out the spheres of our federal as compared with our state government.

The Court of Appeals for the Fourth Circuit has committed a patent error in failing to apply the law of South Carolina—and the correct rule elsewhere—in determining the sufficiency of the evidence in this case. It is the function of this Supreme Court to guarantee the right of trial by jury.

In eroding the jury system, appellate courts present their judgments in clever and perfected syntax and their decisions are buttressed with technical arguments more

reasoned and more legalistic than the briefs of appellants who say that they have been wronged by the action of juries.

But *Erie v. Tompkins* is the law of the land, and this is a case in which it should have been applied in testing the sufficiency of the evidence. We submit that by any test, this case was properly submitted to the jury, but there can be no possibility of doubt under the test applicable in a case tried in the forum of South Carolina.

We believe that this court, like Lincoln, is willing to put its faith in the people—and the preservation of the jury system is a measure of our confidence in the people. As Lincoln said:

"Why should there not be a patient confidence in the ultimate justice of the people? Is there any better or equal hope in the world?"

The jury system in our courts is the voice of the people. Let its clarion notes ring out. Tamper with it and the Seventh Article of the Bill of Rights, preserving the right of trial by jury, becomes a guarantee "full of sound and fury, signifying nothing".

CONCLUSION

The case is one like *Gibson v. Phillips Petroleum Co.*, 352 U. S. 874, 1 L. Ed. (2d) 77, 77 S. Ct. 16, in which the Court should reverse on the record before it on this petition, so patent is the error of the Court of Appeals.

Or, if this Court deems fit, we should certainly like the opportunity to show how the Court of Appeals for the Fourth Circuit has skirted and avoided the mandate of *Erie v. Tompkins*.

Respectfully submitted,

C. T. GRAYDON,

AUGUSTUS T. GRAYDON,

W. GIST FINLEY,

Attorneys for the Petitioners.

APPENDIX

A. **Excerpts from the Transcript of Record:**

The two volumes of the joint appendix contain most of the pertinent parts of the Transcript of Record, but the following excerpts are reproduced to show the manner in which the petitioners (plaintiffs below) negatived the other possible causes of plaintiffs' losses.

(1) The County Agent, **Charles W. Risher**, at pages 341-343 testified:

* * *

"Q. Lighting was satisfactory so far as you could observe? Is that right?

A. Yes, sir.

Q. You never in any of your visits observed any evidence of disease visually?

A. Not infectious disease. Of course, like Dr. Bierer said, anything other than normal would be a disease and that egg-bound condition, you would call that a disease but not a germ, not anything caused by a germ. I didn't see anything that to me would indicate that." * * *

* * *

"Q. * * * You spoke of birds being upset when they changed from one feed to another. What—how long does that last?

A. It would all depend. Ordinarily, if the feed is palatable, they change to it and it wasn't too big a change, they would go to it. You would expect them to be on another feed in a couple of days. I will say one thing about this lighting and this age business: I questioned them at length about that. They were using the same lighting system and birds of the same age before." * * *

(2) **Dr. C. J. Richey** of Clemson College, South Carolina's Agricultural College, on cross examination, testified as follows at pages 371-373:

* * *

"Q. If the feed tests that have been made of this feed show there is no contamination in the feed; and if it shows it contains the things that it is supposed to

contain on the label; and this prolapse condition of the turkey vents occurs and this egg bound condition which you have heard described and this concrement in the oviduct; and you are given a history that when these birds were put on the range, about one per cent of them were positive reactors to Typhimurium; and you were given a picture that when the birds were autopsied, Paracolon germs were found; and that when another was autopsied, Pastuerella Avicida was found; and when others were cultured E. Coli and Proteus were found; and when the blood was tested it proved to be suspicious of Newcastle, to what would you contribute the condition of the flock which has been described, the prolapse and egg bound condition?

A. That question will have to be answered maybe at some length.

The first consideration is the Typhimurium test. I wouldn't consider a positive plate or tube Typhimurium agglutination test of any significance other than being suspicious that the bird had come in contact with that organism. In my work on Pullorum and Typhimurium, I must isolate and identify the organism to prove that the bird is diseased. I pay little or no attention to Paracolon or Proteus unless I can prove they are pathogenic. The isolation of an organism resembling Pastuerella Avicida means nothing unless I see clinical symptons of the disease and have some evidence of the disease as a flock condition. I have gone over that part of it. The Newcastle consideration to me is of no value because of two negatives and one suspicious. I would like to know what titer the suspicious was obtained. If it isn't of significant titer, a suspicious Newcastle HI test to me has little or no meaning.

Now, then, I've forgotten your direct question, if you would repeat it.

Q. Assuming there is no contamination in the food and assuming that the mash supply comes up to specifications, to what would you attribute this condition?

A. I would contribute it to an excess of some product, substance, in feed or lack of something in the feed or the sudden change of the type of feed. I would have to consider that part of it. I can't consider a disease entity in this instance at all.

Q. Would you consider the fact that only five birds were autopsied at the Livestock Station a sufficient test for 2500 birds?

A. Five typical bird of 2500, I would consider a representative sample.

Q. You would consider that a representative sample?

A. Yes.

Q. And you would discard the fact that one of the—there was isolated an organism which represents Pasteurella Avicida? You would consider that of no importance?

A. Yes, I would. If you have seen a flock with Fowl Cholera, I believe you would certainly find many birds infected with that organism and they would be very numerous in the blood stream." • • •

(3) **Dr. C. L. Morgan,** also of Clemson, testified as follows at pages 387-388:

• • •

"Doctor, taking that the flock here in question was healthy and, further, of a good strain; raised under good conditions with experienced growers; that there is no presence of disease in the flock and they refuse to eat the food or didn't eat the food; began to get hungry; began to make a lot of noise and develop prolapse, what would you say that that condition was a result of, taking all those things I have put before you as true.

A. You have set up several questions there, I believe, Mr. Graydon. You are talking about refusal to eat feed and also talking about prolapse. I think we would have to separate those.

Q. What do you say about refusal to eat feed?

A. Of course, it's already been stated by several others that any change in feed as to character, color,

shape, etc., the bird will refuse to eat it at first if it isn't near enough like the previous ration for them to recognize it as feed.

Q. Go ahead. Suppose that after they had been on it for several days they still refuse to eat it and develop these conditions, what would you say then?

A. I would think then that there was some—probably some physiological reaction which if they had eaten the feed, if they had accepted it at all, there would probably be some physiological reaction that was causing the birds to refuse to eat it.

Q. By "physiological reaction"—explain that to the jury.

A. Well I might—this would be too simple a case, I guess, but if you ate too much ice cream and got sick, you wouldn't want some ice cream next day, I would say; and if there was something in this feed that the birds were consuming that didn't agree with them, they would be inclined to refuse it. Be inclined to refuse it and I would say they would.

The COURT: If you eat something and don't like it, you don't want to eat it again?

The WITNESS: Yes, sir, and just what's happening in your body, I wouldn't be able to fully explain but something is going on." • • •

And at pages 394-395:

• • •

"Q. Do you yourself have an opinion as to the time, if you are going to light your birds, when they ought to be lit?

A. The lighting is for the purpose of getting eggs during the short days during the year before there is sufficient daylight to give them adequate stimulus for maximum egg production.

Q. That is what Dr. Naber spoke of as pressing the birds or speeded up production?

A. I don't think you can always say lights is always a pressing factor. You are trying to create the daylight or natural conditions and give the birds an opportunity to come in to lay. I wouldn't disagree

with his statement, however, that lighting might sometimes be considered pressing; but it's more my opinion of giving natural conditions for the birds to reach maximum production.

Q. It is to bring your egg production in early?
A. Yes." * * *

B. The opinion of the Court of Appeals for the Fourth Circuit, written by Judge Sobeloff, argued November 21, 1956, and decided January 25, 1957, is as follows:

SOBELOFF, Circuit Judge:

This is a controversy between turkey breeders and a manufacturer of turkey feed, in which the former claim that a turkey malady which hampered their breeding operations in 1955 was due to a change in the manufacturer's feed of which the plaintiffs were not forewarned. Since the appeal poses the question of sufficiency of the evidence to raise an issue for the jury, a somewhat detailed recital of the facts adduced by the plaintiffs is necessary.

J. S. Edmunds and Sons, who were the plaintiffs below and are the appellees here, have been engaged in the turkey-raising business at Clover, South Carolina, for twenty-five years. Their method of operation is to purchase turkeys for breeding purposes, usually share cropping them to experienced turkey farmers. They maintain a hatchery for the eggs produced and then either sell the poults to other turkey growers or raise the young turkeys themselves. In addition, plaintiffs maintain a plant in which turkeys are processed for consumption by the public.

Ralston-Purina Company, defendant-appellant, manufactures and sells feed and supplies for turkeys and other farm animals. Before the present controversy, Edmunds used Purina products exclusively in their own breeding program and sold turkey feed and supplies in the Clover area under a Purina dealership.

The relevant background facts have their origin in 1954, when, for the first time, Edmunds had a flock of "Berryman broad-beasted bronze" turkeys, a turkey strain purported to be of high breeding quality. These turkeys had been share cropped with a farmer named Penley, and his

flock that year had the best production record ever achieved by any of Edmunds' turkey farmers. Attributing Penley's success to the lineage of the turkeys and hoping that all of the plaintiffs' share croppers might duplicate his performance the following year, plaintiffs, on December 14, 1954, purchased 2,500 hens and 250 toms 24 to 26 weeks old, of the same strain, from the Berryman farm in Winchester, Kentucky. The turkeys were brought to Clover the next day and were distributed to Edmunds' three share croppers: Penley, Lawrence, and Hammond.

Upon arrival the turkeys were vaccinated against fowl pox, and blood samples were taken and sent to the Clemson College Livestock Laboratory. Results of the tests indicated that twenty-three turkeys had either a positive or suspicious reaction to Salmonella Typhimurium, a disease which makes turkeys unsuitable for breeding purposes. Though the twenty-three diseased or suspected turkeys were killed when the laboratory report reached Clover, the condemned turkeys had mingled with the others in the interim. Another 150 blood samples, taken at the same time as the others, were spoiled and could not be analyzed; the samples were never replaced, and there is no certainty as to the actual condition of the fowl from which these samples were taken.

Another circumstance to be noted is that upon arrival at Clover, South Carolina, the toms were immediately placed under artificial lights during the night time, and the hens were lighted about a week later. Such a procedure is designed to stimulate egg production.

As plaintiffs were under contract to purchase Purina feed exclusively, the turkeys were immediately taken off their diet at Berryman's (Red Comb feed plus grain) and put on Purina *Growing* Chow, a complete feed not required to be supplemented by grain. This diet, however, was not long continued, inasmuch as mating and production were not far off, and the menu was again changed, on December 22, to Purina *Breeding* Chow supplemented by oats. This was a feed manufactured in pellet form, each pellet being 3/16-inch in diameter. The pellet, made according to a

Purina formula, contained various ingredients and apparently had been an acceptable and successful turkey feed.

For some time, Purina had planned to reduce the size of this pellet from 3/16-inch to 5/32-inch, the apparent reason for the change being the advantage that would accrue from employing the same size dies for turkey feed pellets and chicken feed pellets. Plaintiffs, however, were never informed of this prospective alteration in size, and after the change Purina continued its usual feed shipments to plaintiffs.

While the change in size is undisputed, the plaintiffs also claimed (and the defendant denied) that the new pellets were different in color and harder in texture than the 3/16-inch pellets. There is no evidence of change in the formula.

The exact date on which the new pellets were put in Edmunds' turkey troughs is not certain, but it was testified by Penley that on or about January 4, 1955, his flock was "hollering" and refusing to eat. It was then, Penley says, that he noticed the smaller pellet in the trough. This, according to plaintiffs' evidence, was the first that Edmunds or their share croppers knew of the change. At about this time, Penley testified, he also noticed that the turkeys' droppings were loose and white. Hammond and Lawrence, two of Edmunds' share croppers, testified that they discovered the smaller pellet on January 6 and January 12, respectively, and that their flocks slacked off in feed consumption, hollered, and had white droppings.

The turkeys went into egg production in the middle of January, but without the success that plaintiffs had hoped for. The plaintiffs introduced evidence to show that fewer eggs were produced than had been anticipated; that the percentage of poults hatched from the eggs produced fell below expectations, and that there were more than the usual number of inferior eggs unfit for hatching. These, known in the industry as "culls," consisted of cracked, odd-shaped, soft-shelled, and "pee-wee" eggs. In addition, there was evidence that an unusual number of turkeys suffered prolapses, known in the trade as "blow-outs." A prolapse occurs when a hen turkey, in passing an egg, turns

her oviduct inside out, causing it to protrude from her body. Autopsies performed on Edmunds' turkeys indicated that this was due to an "egg-bound" condition in which the egg clings to the interior walls of the oviduct, and when the hen attempts to pass the egg, the oviduct passes with it. The autopsies also indicated that, due to the exposure of the oviduct, the prolapsed hens suffered from peritonitis.

Claiming that these difficulties stemmed from the change in Purina's Breeding Chow, Edmunds brought suit for the loss of anticipated profits in their 1955 operations.

The basis of the action is either in the implied warranty that the feed was fit for its intended purpose, or in a claimed promise to plaintiffs in February, 1955, by Purina's southern sales manager, that if Edmunds would continue to use Purina's new pellets until the source of Edmunds' troubles was ascertained, Purina would guarantee all losses if the pellets were found to be at fault.

At the trial plaintiffs produced detailed calculations of their claim, which was essentially the difference between their actual production record and the production anticipated for 1955, based on the 1954 experience of Penley with Berryman turkeys. The alleged damages also included the loss of profits from feed sales to other farmers to whom plaintiffs would have sold poults if hatched. Farmers in the general vicinity of Clover, who had bought Edmunds' poults in the past, tended to buy feed from Edmunds. Also included in the estimate of damages were profits from Edmunds' processing plant, the operations of which were said to have been reduced by the failure of the turkey crop.

At the conclusion of the evidence, the defendant's motion for a directed verdict was denied and the case was submitted to the jury, which returned a verdict of $40,000.00 for the plaintiffs. On defendant's motion for judgment on its counterclaim of $47,831.02 (an agreed figure), due Purina by Edmunds on prior accounts, the Court deducted the $40,000.00 verdict and entered judgment for the defendant for the difference of $7,831.02, with seven percent interest from May 1, 1955, and five percent attorney's fees.

Defendant Purina appeals, several grounds of reversal being urged. We lay aside all but one, which we think requires reversal, namely, the denial of the motion for a directed verdict.

Viewing the plaintiffs' evidence, including all reasonable inferences therefrom, in the most favorable light, as is required on a motion for a directed verdict, we assume, for the purposes of this opinion, that the evidence indicated two basic facts: first, that there had been some change in the Purina Breeder chow pellet; and, second, that plaintiffs experienced serious difficulties in their breeding program, with many turkeys suffering from an "egg-bound" condition and prolapse. In our opinion, however, the causal relationship between these two facts, which it was incumbent upon plaintiffs to establish in order to recover, is not proved with the requisite certainty. The existence of such relationship was the crucial issue in determining whether or not plaintiffs presented a case requiring submission to the jury. Unless there was sufficient evidence which, if believed, showed that the change in the Purina pellet was the efficient cause of the production difficulties experienced with Edmunds' flocks, the plaintiffs may not recover. It must be remembered that the question to be resolved is "not whether or not there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict. . . ." *Gunning v. Cooley*, 281 U. S. 90, 94.

Plaintiff's evidence appears to proceed upon three alternative theories of proximate cause: (1) that the trouble was caused by a nutritional deficiency in the new pellet; (2) that changes in the pellet, such as size, color, smell, or hardness, regardless of their nutritional quality, had an adverse psychological effect upon the turkeys which caused them to stop eating and, therefore, to suffer from insufficient nourishment; or (3) that regardless of whether the new pellets affected the turkeys' nourishment, the mere psychological effect of changing the pellet was to upset the birds and directly to disturb their reproduction processes. While it is not clear upon which of these alternative theories plaintiffs place chief reliance, or whether their

case rests upon a combination of the three to create the required measure of proof, we think that as to each separately or all together, there was insufficient evidence to create a jury question.

In attempting to show that the change in the pellet was the source of the turkeys' malady, plaintiffs produced considerable expert testimony, which failed, however, to show a *probable* relationship between the claimed cause and the result complained of. It was effective, at most, to indicate that under each of the three alternative theories, there was a *possibility* that the feed *could* have caused the trouble. Furthermore, the testimony of plaintiffs' own experts indicated other possible causes, disease and excessive lighting, which are not negatived and for which the defendant would not be liable. Alternative possibilities as to the cause of an event are not enough where the defendant is liable under one and not under the others and where no basis for a rational choice among the alternatives is provided. They invite sheer conjecture and speculation and hence raise no question for the jury. *Atlantic Coast Line Railroad Co. v. Collins, Cir.* 4, 235 F. (2d) 805. *Thomas v. Kasco Mills, Cir.* 4, 218 F. (2d) 256; *Henry H. Cross Co. v. Simmons,* Cir. 10, 68 F. (2d) 520, 522. "It is not sufficient to show a set of circumstances bringing the theory of plaintiffs within the realm of possibilities, nor can the theory itself furnish the deficiency; the evidence must bring the theory to the level and dignity of a probable cause. *Gunning v. Cooley, supra;" Franklin v. Skelly Oil Co.,* Cir. 10, 141 F. (2d) 568, 570-1. See also *United States v. Crume,* Cir. 5, 54 F. (2d) 556, 558, *Love v. New York Life Insurance Co.,* Cir. 5, 64 F. (2d) 829, 832.

Evidence which shows a "probability" and not a mere "possibility" is especially necessary in a case such as this, where expert testimony is heavily relied upon to prove that one event was the proximate cause of another. *Bearman v. Prudential Insurance Co. of America,* Cir. 10, 186 F. (2d) 662; *Windham v. City of Florence,* 70 S. E. (2d) 553; 221 S. C. 350, and cases there cited.

Although the plaintiffs' first theory of proximate cause hinges upon the important factor of a nutritional defi-

ciency in the 5/32-inch pellet, the plaintiffs adduced no evidence of such deficiency in the new pellets. Indeed, such evidence as they did offer on this point is to the contrary. Tests which Edmunds caused to be made upon the pellets by Hahn Laboratories and the State Laboratory at Columbia showed that the feed was up to specifications. Plaintiffs sought to diminish the adverse force of this evidence, on the ground that the tests were made upon a second batch of pellets after defendant had taken the first batch back to the factory to be tested; but the fact remains that no testimony is to be found in the record to warrant a finding that the formula of the 5/32-inch pellets was in any substantial respect different from that of the 3/16-inch pellet. The nearest that plaintiffs' experts came to providing a basis for such a finding was in answer to a hypothetical question predicated on the hypothesis that all other conditions were satisfactory and that there was no evidence of disease or adverse lighting conditions. Making the assumptions as directed, the witnesses said that under such circumstances, they would be led to believe that refusal to eat the feed was due to its nutritional deficiency or its unacceptability to the turkeys. Inasmuch as there was evidence of disease and unfavorable lighting conditions, the answer elicited by the hypothetical question is of little value in establishing nutritional deficiency as the source of the turkeys' disorders. If one assumes, as the witnesses were required to assume, that all other factors were satisfactory, focusing attention upon the pellet alone, no other answer could reasonably have been expected. At most, the witnesses' answer could be said to suggest that the feed was a possible cause. This does not advance the plaintiffs' case sufficiently, for the jury may not be permitted to guess between competing possibilities.

That the turkeys suffered from a lack of nourishment was a salient factor of both the first and second theories of proximate cause, stemming in the first theory from a nutritional deficiency in the pellet itself and in the second, from the turkeys' refusal to eat it. No substantial evidence was produced, however, diagnosing such a condition in the turkeys. To the contrary, in fact, was the testimony

of one of plaintiffs' key witnesses, Dr. Bierer, that he had found no clinical evidence of nutritional deficiency in the turkeys that he tested; and Dr. Naber, another of plaintiffs' experts, testified that his research indicated no nutritional factors that would produce the condition from which the plaintiffs' flocks suffered. These statements greatly detract even from the possibility, let alone probability, of the theory plaintiffs advance.

Under the plaintiffs' second theory of causation, the turkeys rejected the smaller pellet and stopped eating. Even on this fact, which is basic to the theory, the plaintiffs' evidence was inconsistent and contradictory. Though Penley and Hammond testified that the turkeys would not eat the new pellet, the feed consumption chart kept by plaintiffs and introduced into evidence by them reveals that the turkeys ate more pellets than grain; and two of the plaintiffs' experts, Drs. Morgan and Naber, corroborate this interpretation of the chart. Inasmuch as the diet of pellets and grain was to have been in equal balance, the inference is open that the grain contained some toxic element or contaminent repulsive to the birds. Indeed, Dr. Naber agreed that the data indicated that the feed did not cause the difficulties unless there was some toxic material contained in it, and this he admitted could have come from the oats, grain, or pellets. While tests performed at plaintiffs' instance on Purina's feed failed to disclose the presence of any contaminant, no such analyses were ever made by plaintiffs on the grain or oats, or on the whey and phenothiazine given the turkeys in early January.

A circumstance upon which plaintiffs place some reliance is that the Penley turkeys improved when they were changed from the Purina feed to Full-O-Pep, a Quaker Oats Company product. But the testimony of plaintiffs' witnesses in this respect was weak and contradictory. Indeed, the witness Bodie, plaintiffs' office manager, admitted on cross-examination that even though the early settings are usually of a low hatchability percentage, the eggs produced by Penley's flock in its third and fourth settings, while on Purina's 5/32-inch pellet, had a higher hatchability rate than those of the next succeeding setting, which

were produced while the flock was being fed the other product.

Regarding the asserted psychological effect, there was testimony in plaintiffs' behalf that turkeys are high-strung birds and that feed changes may upset them. There was, however, no substantial evidence that the turkeys' disorders were likely to have resulted from the psychological effect of the feed change. On the contrary, plaintiffs' own witnesses indicated that the change in the pellet would not have an adverse effect. Dr. Naber testified that the hardness would have no effect on the turkeys' acceptance of the feed; Dr. Richey said he did not think the size would cause the trouble, and Mr. Mathis said there was no significant change in color; while Dr. Naber was merely able to say that the color of the pellet *might* affect the turkeys' acceptance, which goes no further than to show a bare possibility. Taking plaintiffs' evidence as a whole, his witnesses merely showed that the "egg-bound" condition, prolapse, and "culls" could have been due to one or more of a number of causes, such as tension resulting from the feed change or anything else in the turkeys' surroundings to which they objected; disease, or pushing them too hard for production by excessive lighting at too young an age. That there was any greater probability that the condition resulted from the feed, so as to provide the jury with a basis for rational choice between the alternatives, was not, however, substantially revealed by plaintiffs' own experts. On the negative side, Dr. Naber in particular was reluctant to say whether the condition might be due to the change in feed; and in answer to a hypothetical question propounded on cross-examination, which instructed him to assume that the feed was without contaminant and up to specifications regarding ingredients with the only change being in size, and to consider the evidence of disease in the case, he said that the feed probably had very little to do with the condition of plaintiffs' turkeys.

As to lighting, one of the possible causes revealed by plaintiffs' evidence, the testimony of their witness Mathis is noteworthy. He testified that thirty weeks was the recommended age for lighting, while plaintiffs' turkeys were

put under twenty-four-hour lights at twenty-four to twenty-six weeks of age. It was said by Mr. Berryman, another Edmunds witness, that these turkeys went into production six weeks earlier than they would normally, and that this was accomplished only by lighting. While plaintiffs' witnesses refrained from expressing definite views as to how much lighting would be excessive, though they recognize that excessive lighting could be harmful, we know that the plaintiffs' turkeys were put on a twenty-four-hour lighting schedule. If this program was not excessive, none could be.

The alternative possibility that the turkeys' malady might be attributable to disease was suggested by plaintiffs' own witnesses. Not only did they testify as a general proposition that prolapse and "culls" could be due to disease, but they indicated its possibility in this particular case. Dr. Bierer examined the blood samples taken on December 15 prior to the use of the defendant's new pellet, and his report showed twenty-three turkeys with a positive or suspicious reaction to Salmonella Typhimurium, which, as earlier stated, makes turkeys unfit for production. In a later diagnosis of three turkeys, after the troubles had begun, he suspected one of having Newcastle disease, a serious turkey ailment; and in another autopsy of one turkey he found a germ resembling Avicida Pasteurella, which causes fowl cholera. On the witness stand, Dr. Bierer declared categorically that soft-shell eggs were symptomatic of a number of diseases, especially of Newcastle. Drs. Richey and Risher, also called by the plaintiffs, testified similarly, though not as emphatically.

Viewing plaintiffs' evidence in its entirety, it appears that their witnesses disclosed other equally plausible explanations for plaintiffs' breeding difficulties in addition to the change in feed; and they failed to show a greater probability that the feed, rather than other causes, was at fault. As said by Judge Soper in *Thomas v. Kasco Mills, supra,* p. 258, in language appropriate to this case, "The evidence of unusual losses was in itself insufficient, for there were many conditions other than food which affected the productivity and growth of the flocks; and the expert testimony was too uncertain to supply the missing link." As the

defendant would not be liable for any of these other causes, which were beyond its control, we conclude that the defendant's motion for directed verdict should have been granted.

We are not inadvertent to the salutary doctrine repeated in recent Supreme Court decisions (*Tennant v. Peoria and P. U. Railway Co.*, 321 U. S. 29; *Wilkerson v. McCarthy*, 336 U. S. 53), that where the evidence supports conflicting inferences, the question is for the jury. We think, however, that these cases are distinguishable, for there is a lack here of substantial evidence to support the inference on which the plaintiffs rely. See also *Kyle v. Swift and Co.*, Cir. 4, 229 F. (2d) 887, where the plaintiffs' experts eliminated other possible causes, the opposite of the situation here.

Reversed and remanded for entry of judgment for defendant, in accordance with the views herein expressed.

Reversed and remanded.

C. Within the time prescribed by the rules of the Court of Appeals for the Fourth Circuit, petitioners filed a petition for rehearing, copies of which have been furnished the Supreme Court. That petition was denied in an order filed March 19, 1957 and reading as follows:

Upon consideration of the Appellee's Motion for Rehearing, it is, this 15th day of March, 1957, by the United States Court of Appeals for the Fourth Circuit, ORDERED that said Motion be, and it is hereby, denied.

MORRIS A. SOPER,
United States Circuit Judge.

SIMON E. SOBELOFF,
United States Circuit Judge.

ROSZEL C. THOMSEN,
United States District Judge.